No. 82-1659

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FRED J. ROBINSON, *et al.*,
Petitioners,

v.

CUMBERLAND CAPITAL CORP., *et al.*,
Respondents.

Writ Of Certiorari
To The Supreme Court Of Tennessee

RESPONDENTS' BRIEF IN OPPOSITION

VALERIUS SANFORD
P. O. Box 2757
Nashville, Tennessee 37219
(615) 244-4994
Counsel of Record
For all Respondents

J. W. BAKER, ESQ.
P. O. Box 1708
Knoxville, Tennessee 37901
(615) 637-5600
For Commercial Credit Plan, Inc.

BERNARD E. BERNSTEIN, ESQ.
600 First Tennessee Bank Building
Knoxville, Tennessee 37902
(615) 546-8030
For American Credit Company and Home Credit Company of Tennessee, Inc.

WILLIAM B. FELKNOR, ESQ.
P. O. Box 144
Maryville, Tennessee 37801
(615) 982-3691
For Cumberland Capital Corporation

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

TABLE OF CONTENTS

	Page
Opinions Below	1
Parties	2
Question For Review	2
Statement Of The Case	3
The Present Status Of The Case	3
The History Of The Case	5
Reasons Why The Writ Should Be Denied	13
I. The Circuit Court Properly Denied The Only Relief Sought By These Petitioners	13
II. After Petitioners' Voluntary Dismissal, No Federal Question Remained As To Them, And This Court Has No Jurisdiction Over The Only Issue Which They Submitted For Adjudication To The Circuit Court	14
III. In Any Event, The Denial Of Retroactive Effect To Its Initial Decision In *Patty* Was Within The Constitutional Power Of The Tennessee Supreme Court And Violated No Rights Of These Petitioners	14
Conclusion	18
Appendix:	
A. Order of the Circuit County for Blount County, Tennessee, dismissing Landmark Finance Corporation of Tennessee as one of the Defendants, January 5, 1977	A-1

B. Stipulation for Entry of Judgment of the Circuit Court of Blount County, Tennessee, dismissing Smoky Mountain Housing Corporation from this case, May 17, 1978 ..... A-3

C. Order of the Circuit Court for Blount County, Tennessee, March 5, 1981 ..... A-5

D. Judgment and accompanying Memorandum of the Circuit Court for Blount County, Tennessee, dismissing Hannum action, April 23, 1981 ..... A-9

E. Order of the Supreme Court of Tennessee, denying the application of Hannum for permission to appeal, December 27, 1982 ..... A-14

F. Tennessee Rules of Appellate Procedure, Rule 11(a) A-15

TABLE OF AUTHORITIES

Tennessee Constitution

Article 11, Section 7 5,6,7,9,15,16

Federal Statute

28 U.S.C. 1257 14

Tennessee Statute

Chapter 204, Public Acts of 1979 9

Rules of Court

Tennessee Rules of Appellate Procedure, Rule 11(a) 1,5

Cases

U.S. Supreme Court

Great Northern Ry. Co. v. Sunburst Oil & Ref. Co. 287 U.S. 358, 53 S.Ct. 145, 77 L. Ed. 360 (1932) 14

U.S. District Court

In re Bogan 281 F.Supp. 242 (W.D.Tenn. 1968) 16

Tennessee State Courts

Bohlinger, et al. v. American Credit Corp., et al. 594 S.W. 2d 710 (Tenn. App. 1979) .. 5,7,10

Bricker v. Sims 195 Tenn 361, 259 S.W. 2d 661 (1953) 16

Cumberland Capital Corporation v. Patty 556 S.W. 2d 516 (Tenn. 1977) 5,7,8,9,10, 14,15,16,17

Roberts v. Roane County 160 Tenn. 109, 23 S.W. 2d 239 (1929) 16

Rust v. Newby 171 Tenn. 127, 100 S.W. 2d 989 (1937) 16

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RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

At the trial of this case, these Petitioners voluntarily dismissed all their claims except for Petitioners' individual claims for a declaration as to the proper construction of the Tennessee Industrial Loan and Thrift Companies Act, as reflected in the order of the Circuit Court for Blount County, Tennessee (R. App., pp. 5-8). Thus, the class and constitutional issues sought to be raised here were voluntarily dismissed.

The opinion and decree of the Tennessee Court of Appeals dated September 17, 1982[1] was the final adjudication on the merits by the highest court to review the judgment of the Circuit Court. Review by the Tennessee Supreme Court is discretionary, Rule 11(a), Tennessee Rules of Appellate Procedure (R. App., p. 15), and that Court denied Petitioners' application for permission to appeal (P. App., p. A-32).

[1] Not 1981 as stated in Table of Contents to Petitioners' Appendix.

PARTIES

The final order of the Circuit Court lists the parties (R. App., pp. 5-6). The Plaintiffs, whose claims for declaratory relief were adjudicated were Fred J. Robinson, Janet Hatcher (formerly Janet Robinson), Tecora Dowdle, James D. Northern and Charles T. Dawson and wife Alice E. Dawson; and the Defendants against whom they had claims were Cumberland Capital Corporation, American Credit Company, Home Credit Company of Tennessee, Inc., B.F.S. Finance, Inc. and American Credit Company of Tennessee, Inc.

In Petitioners' list of parties, the name Smoky Mountain Housing Corporation appears. An agreed stipulation for entry of judgment was entered dismissing that Plaintiff from this case on May 17, 1978 (R. App., pp. 3-4).

Charles T. Dawson and wife Alice E. Dawson are not included in Petitioners' list of Plaintiffs. Presumably, they do not join in the petition.

The only original Plaintiff asserting a claim against Commercial Credit Plan, Inc. was Sharon Hannum. Her case was tried on the merits and a separate judgment entered against her (R. App., pp. 9-13). No mention is made of her claim in the petition and she is not a party to the petition. Therefore, Commercial Credit Plan, Inc. is not a proper Defendant.

In addition, Petitioners list Landmark Finance Corporation of Tennessee as one of the Defendants, but that Defendant was dismissed by order dated January 5, 1977 (R. App., pp. 1-2), and Petitioners preserved no claim against it.

QUESTION FOR REVIEW

In view of the voluntary dismissal taken by these Petitioners, the only justiciable question which remained in this case as to them before the Tennessee Appellate Courts was whether the

Circuit Court of Blount County, Tennessee, erred in denying a declaratory judgment as to the method of computing interest on loans under the Tennessee Industrial Loan and Thrift Companies Act. No other question can properly be before this Court.

STATEMENT OF THE CASE

The Present Status Of The Case.

This is not a class action, and the issues which the Petitioners seek to raise are not properly before the Court.

At the outset of the trial of this case, Petitioners, through their counsel, voluntarily dismissed all claims for relief except the individual claims of the named Plaintiffs for the declaratory relief prayed in Paragraph 12, Section 2 of the complaint (R. App., pp. 5-8).[2]

Paragraph 12, Section 2 of the complaint provides,

> 2. That this Honorable Court declare and determine pursuant to Rule 57, declaratory judgment that the method of computing interest on loans made by the Defendants and the members of the Defendant class violates the provisions of the Industrial Loan and Thrift Companies Act.

The transcript, at p. 10, makes that clear,

> MR. SANFORD: I'm not sure that I understand, and this is no longer any action for any kind of damages, it's strictly an action for declaratory judgment, is that right?
>
> MR. BLACK: As to those people.
>
> MR. MEARES: As to the named plaintiffs.

---

[2] The same order appears in Petitioners' Appendix, pp. A-15 - 21, except that the language on p. A-16 is not correctly copied.

Thus, these Petitioners voluntarily dismissed any remaining claims for class relief (such claims having also been previously denied by the courts), voluntarily dismissed any claims with respect to any constitutional issues, and voluntarily limited their claims to a declaratory judgment as to the proper construction of the Tennessee Industrial Loan and Thrift Companies Act.

After Plaintiffs (Petitioners) voluntarily dismissed, Defendants (Respondents) moved to dismiss their claim for relief on the grounds that in the Pretrial Order the court had already ruled the case was not a proper one for declaratory relief and that Plaintiffs were seeking a mere advisory opinion about a statute which had been repealed. That motion was granted (R. App., p. 6).

Sharon Hannum was one of the original Plaintiffs in this case. All her claims against the Defendant Commercial Credit Plan, Inc. were excluded from the voluntary dismissal (R. App., pp. 6-7). Her case was tried on the merits, resulting in a judgment for the Defendant and her case was dismissed (R. App., pp. 9-13).

Hannum and the Petitioners here then filed separate appeals. While no order of consolidation was entered, the appeals were heard together and disposed of by the Tennessee Court of Appeals in a single opinion and decree (P. App., pp. A-22, A-25). The Court of Appeals held that since the Industrial Loan and Thrift Act had been repealed, a declaration would be meaningless and serve no useful purpose for the future; that the Circuit Judge did not abuse his discretion in holding that this was not a proper case for declaratory judgment; that Plaintiffs (Petitioners) had not been denied any constitutional rights; and that the Defendant Commercial Credit Plan, Inc. did not violate the Act in computing the charges made to Plaintiff Hannum (P. App., pp. A-28 - 30).

Hannum and the Petitioners (who have been represented throughout this litigaton by the same counsel) then filed separate, but almost identical, applications for permission to appeal to the Supreme Court of Tennessee. That court denied the applications (P. App., p. A-32, R. App., p. 14). Thus, the decision of the Court of Appeals was the final adjudication on the merits of this case (Rule 11(a), Tennessee Rules of Appellate Procedure, R. App., p. 15).

The case of the Plaintiff Hannum was decided against her, and she has filed no petition for certiorari in this Court. The Petitioners who have filed are barred by their own voluntary dismissal. They voluntarily confined their claims to relief to Paragraph 12, Section 2 of the complaint, and the issues they seek to raise here were not encompassed within that claim.

The History Of The Case.

This case arose out of a controversy concerning the proper construction of Article 11, Section 7 of the Tennessee Constitution of 1870, which provided, "The Legislature shall fix the rate of interest, and the rate so established shall be equal and uniform throughout the State; but the Legislature may provide for a conventional rate of interest, not to exceed ten per centum per annum;" and the application of that provision to the Industrial Loan and Thrift Companies Act (ILTCA) initially adopted in 1951 and then codified as Chapter 20, Title 45, Tennessee Code Annotated.

This case and the closely related cases of *Cumberland Capital Corporation* v. *Patty*, 556 S.W.2d 516 (Tenn. 1977), and *Bohlinger, et al.* v. *American Credit Corp., et al.*, 594 S.W.2d 710 (Tenn. App. 1979)[1], have involved numerous proceedings in the

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[1] The same counsel who represented *Patty* and the *Bohlinger* plaintiffs represent the Petitioners.

trial and appellate courts, most of which are no longer relevant. In order to place the issues presently before the Court in context, however, reference to certain aspects of all three cases is appropriate.

On November 21, 1975, the original complaint was filed in this case in the Circuit Court of Blount County, Tennessee. The Plaintiffs (including the Petitioners here and Sharon Hannum) sued as representatives of an alleged class consisting of all persons who had borrowed money from industrial loan and thrift companies in Tennessee against the named Defendants (including the Respondents here) and an alleged class consisting of all persons who had loaned money pursuant to the ILTCA. The complaint alleged that the ILTCA was unconstitutional, that all members of the Defendant class had violated Article 11, Section 7 of the Tennessee Constitution and had violated the ILTCA. The Plaintiffs prayed: (i) for declaratory judgment declaring the ILTCA unconstitutional; (ii) for declaratory judgment that the method of computing interest on loans used by Defendants and the Defendant class violated the ILTCA; (iii) that the case be maintained as a Plaintiff class action against the Defendant class; (iv) that the Plaintiffs and the Plaintiff class have judgment against the Defendants and the Defendant class for an amount being fair and equitable, not to exceed Seventy-Five Million Dollars ($75,000,000.00), and that punitive damages be assessed in an amount not to exceed Five Million Four Hundred Thousand Dollars ($5,400,000.00); (v) for attorneys' fees and costs; and (vi) for general relief.

On November 17, 1976, the Circuit Court entered a memorandum and order concluding that the case should proceed as a class action subject to Plaintiffs demonstrating their financial ability to sustain it, defining the Plaintiff class and the Defendant class and stating the issues. After a hearing, the Court found that the Plaintiffs were able to sustain the case as a class action.

The Defendants then presented a petition for certiorari and supersedeas to Honorable James W. Parrott, Chief Judge of the Tennessee Court of Appeals, who ordered the issuance of the writ of certiorari setting aside the class action order on the ground that that order exceeded the Court's jurisdiction in creating the Defendant class. Plaintiffs then filed a motion which was treated as a motion to rehear and a panel of the Court of Appeals held that class actions were equitable matters over which the Circuit Court had no jurisdiction. The Plaintiffs then filed a petition for certiorari to the Tennessee Supreme Court to review the action of the Court of Appeals.

On August 22, 1977, the Tennessee Supreme Court decided *Cumberland Capital Corporation* v. *Patty,* 556 S.W.2d 516 (Tenn. 1977), reviewing the history of usury laws in Tennessee in detail and holding that case was one of first impression; that the Tennessee Constitution did not fix a ten percent (10%) limitation on interest, a suggestion "often heard"; that the Legislature under the first clause of Article 11, Section 7 could fix any legal rate of interest; that the Legislature was not required to fix a conventional rate; that no part of Article 11, Section 7 was self-executing; that the interest limitation in the Constitution related to a maximum effective rate of interest; that the ILTCA provided for a conventional rate of interest; and that the interest provision of the ILTCA was unconstitutional insofar as it applied to any obligation discounted at seven and one-half percent (7-1/2%) per annum and payable in monthly installments if the end result was an effective rate of interest in excess of ten percent (10%) per annum.

On August 23, 1977, the same attorneys for the Plaintiffs (who also represented Mr. Patty) in this case filed a complaint in *Bohlinger, et al.* v. *American Credit Corp., et al.,* in the Circuit Court for Blount County for a class of Plaintiffs against a class of Defendants, substantially the same as the classes alleged in this case, alleging violation of the Tennessee Constitution based on the *Patty* decision and seeking recovery of all interest charged in excess of ten percent (10%).

On September 19, 1977, the Tennessee Supreme Court granted the Plaintiffs' petition for certiorari in this case, set aside the order of the Court of Appeals and remanded this case to the Court of Appeals for determination of pretermitted issues — "In particular, the Court of Appeals should determine whether this cause can or should properly be permitted to proceed as a class action in light of the decision of this Court in the case of *Cumberland Capital Corporation* v. *Patty*, released on August 22, 1977, dealing with the constitutional issue raised in the instant case."

The matter was heard before the Court of Appeals on October 5, 1977, and on October 6, 1977, the Court of Appeals entered an order holding that the case could not proceed as a class action on the ground of the absence of common questions of law or fact, vacating the order of the Circuit Court and remanding the case for further proceedings (P. App., p. A-5).

On October 11, 1977, the Tennessee Supreme Court granted a petition to rehear in *Patty*, reviewed prior decisions with respect to the prospective or retrospective application of a decision and concluded that the decision in *Patty* would be applied to obligations incurred on or after August 23, 1977 and all interest accruing on and after that date, but retrospectively to all cases wherein there had not been strict compliance with the ILTCA. The Court said, at p. 542, "hence, we apply the new rules to the case at bar, but prospectively, to all present or future litigants, except in those cases where the lender did not comply with the Industrial Loan and Thrift Act."

On October 21, 1977, Plaintiffs in this case filed a petition in the Tennessee Supreme Court in the *Patty* case, alleging that the decision of the Court on the petition to rehear in *Patty* deprived them of their constitutional rights and asking that the decision on the petition to rehear in *Patty* be declared void and vacated, or alternatively, that process issue and be served on all industrial loan and thrift companies and that they be required to answer

the petition, that a hearing be held on the petition with a jury impaneled to try the issues joined, that the original decision in *Patty* be declared to have retroactive effect and for general relief.

On November 21, 1977, the Tennessee Supreme Court entered an order denying Plaintiffs' petition and holding, "Insofar as the Petition represents an application to intervene in the case of *Cumberland Capital Corporation* v. *Patty,* the Court is of the opinion that the application is not timely and it is denied, without prejudice, however, to the right of any of the petitioners to present and rely upon the arguments and contentions contained in the Petition in the regular course of appellate review of any of the cases referred to in the Petition." (P. App., p. A-8). No review of that Order was sought in this Court.

On January 16, 1978, the Plaintiffs' petition for certiorari to the Tennessee Supreme Court to review the order of the Court of Appeals denying class action status in this case was denied (P. App., p. A-10).

On the remand to the Circuit Court, the Plaintiffs filed a further amendment to their complaint adding a new paragraph XI(A), alleging that the decision in the *Patty* case was foreseeable and that the defendant class did not rely upon the constitutionality of the ILTCA, but knew it was unconstitutional. Paragraph XII of the complaint was, however, not amended. The Plaintiffs then filed another motion for certification as a class action.

By vote of the people of Tennessee, Article II, Section 7 was amended effective March 31, 1978 to provide that "the General Assembly shall define and regulate interest, and set maximum effective rates thereof"; and validating existing statutes including the ILTCA until July 1, 1980, unless sooner amended or repealed. By Chapter 204 of the Acts of 1979, the Tennessee Legislature repealed the former ILTCA and adopted a new statute.

On November 27, 1978, motions to dismiss were granted in the *Bohlinger* case on the ground that the Court of Appeals ruled in the *Robinson* case that it could not proceed as a class action. The Plaintiffs in that case appealed to the Court of Appeals.

On January 16, 1979, there was a hearing on the Plaintiffs' motion to certify this case as a class action and an order was finally entered, again denying class action status on April 19, 1979.

On October 16, 1979, the Court of Appeals affirmed the dismissal of the *Bohlinger* complaint, including the denial of the class action. That decision is reported at 594 S.W.2d 710 (Tenn. App. 1979). On February 19, 1980, the application for permission to appeal was denied in *Bohlinger*.

A new judge, Chancellor High, having been designated to hear the case, Plaintiffs once again renewed their efforts to have the case certified as a class action, this time emphasizing that they were seeking declaratory relief and that the awarding of damages would be incidental to that relief.

On October 12, 1980, Chancellor High held a pre-trial conference and on December 29, 1980, entered a memorandum and pre-trial order (P. App., p. A-11). In that order, Chancellor High held: (i) that this was not a proper case for either declaratory relief or class action; (ii) that every person is entitled to rely on the constitutionality of a legislative act until such time as the act is declared unconstitutional; (iii) that at the time of Plaintiffs' loans, the Supreme Court had not declared any part of the ILTCA unconstitutional; (iv) that the *Patty* decision limited retroactive application to cases where there was not strict compliance with the ILTCA; (v) that the Plaintiffs were, therefore, not entitled to attempt to prove that Defendants had knowledge at the time the loans were made that the ILTCA was unconstitutional; and (vi) that the issues to be litigated on the trial would be:

(a) Did the defendant in each particular transaction, violate the Industrial Loan and Thrift Act as then written?

If (a) is answered "yes", then

(b) What amount of overcharge was collected by the defendant in that transaction?

(c) Is the particular plaintiff barred from recovery as a matter of law?

(d) Did defendants willfully violate the statute so as to warrant the imposition of punitive damages?

The case was set for trial on February 2, 1981.

At the outset of the trial, the Plaintiffs took a voluntary dismissal without prejudice as to all Plaintiffs except Sharon Hannum, as to all issues and claims for relief except the individual claims for declaratory relief in Paragraph XII, Section 2 of the complaint — thereby leaving for disposition those individual claims for declaratory relief by all Plaintiffs against all remaining Defendants and all claims of Plaintiff Hannum against Defendant Commercial Credit Plan, Inc.

The Defendants then moved to dismiss as to the claims for declaratory relief on the grounds that the Court had already excluded declaratory relief in the pre-trial order, that the Plaintiffs were seeking an advisory opinion, and that the Constitution and the ILTCA had been rewritten.

The Court granted Defendants' motion and dismissed the case as to all Plaintiffs except for the claims of Sharon Hannum against the Defendant Commercial Credit Plan, Inc. (R. App., pp. 5-8).

The case of Sharon Hannum against Commercial Credit Plan, Inc. then proceeded to trial, resulting in a judgment for the Defendant, which was entered on April 23, 1981 (R. App., pp. 9-13).

The Petitioners and the Plaintiff Hannum then filed separate appeals to the Tennessee Supreme Court, but that Court held it had no jurisdiction to hear them and transferred them to the Tennessee Court of Appeals. The Petitioners and Plaintiff Hannum filed a single joint brief and the two appeals were heard together.

The Court of Appeals affirmed the action of the Trial Court, holding that the Trial Court did not abuse its discretion in holding that this was not a proper action for declaratory judgment; the Plaintiffs had not been denied any constitutional rights; and the proof supported the action of the Trial Court in holding that the Defendant did not violate the ILTCA.

Petitioners and Plaintiff Hannum then filed two separate, but substantially identical, applications for permission to appeal to the Tennessee Supreme Court. The reasons advanced in support of each were the same. The Tennessee Supreme Court denied both applications for permission to appeal.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Circuit Court Properly Denied The Only Relief Sought By These Petitioners.

During the course of this protracted litigation, these Petitioners and the other Plaintiffs raised numerous issues; but at the trial of the case on February 2, 1981, all claims of these Petitioners were voluntarily dismissed except for the declaratory relief prayed for in Paragraph 12, Section 2 of the Complaint, i.e.,

> 2. That this Honorable Court declare and determine pursuant to Rule 57, declaratory judgment that the method of computing interest on loans made by the Defendants and the members of the Defendant class violates the provisions of the Industrial Loan and Thrift Companies Act.

The ILTCA, with respect to which the declaration was sought had, however, been repealed in 1979; and the provisions of the Tennessee Constitution governing the powers of the Legislature with respect to interest had been rewritten in 1978. The Circuit Court, thus, properly dismissed Petitioners' claim for a declaration as to the proper construction of a statute which had long since been repealed.

"All claims" of Plaintiff Hannum against Defendant Commercial Credit Plan, Inc. were, however, tried on the merits. Apparently, counsel for Petitioners, who also represented Plaintiff Hannum, decided to use the Hannum case as a test case. In any event, after a trial on the merits, the Circuit Court entered judgment for the Defendant in that case. As previously discussed, that case was appealed and heard together with Petitioners' case by the Tennessee Court of Appeals, which affirmed the Circuit Court.

The Plaintiff Hannum is not included in the list of parties on p. ii of the petition for certiorari; and no mention is made in the petition of the trial of her case.

In any event, the issues raised in Pargraph 12, Section 2 of the Complaint, i.e., the declaratory issues as to which the Petitioners sought relief, were tried on the merits in the *Hannum* case. Thus, there was and is no occasion for any further declaration in that regard.

II. After Petitioners' Voluntary Dismissal, No Federal Question Remained As To Them, And This Court Has No Jurisdiction Over The Only Issue Which They Submitted For Adjudication To The Circuit Court.

Manifestly, the claim for relief stated in Paragraph 12, Section 2 of the complaint in this case, quoted above, raises no issues cognizable by this Court under 28 U.S.C. § 1257.

III. In Any Event, The Denial Of Retroactive Effect To Its Initial Decision In Patty Was Within The Constitutional Power Of The Tennessee Supreme Court And Violated No Rights Of These Petitioners.

Petitioners' contentions are contrary to well-settled law. As this Court held in *Great Northern Ry. Co.* v. *Sunburst Oil & Ref. Co.*, 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360 (1932), at p. 364,

> This is a case where a court has refused to make its ruling retroactive, and the novel stand is taken that the constitution of the United States is infringed by the refusal.
>
> We think the Federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward.

Indeed, the thorough opinion of the Tennessee Supreme Court in enunciating its decision not to give the initial *Patty* decision retroactive effect, begins with that basic premise and continues through a well-reasoned review of the prior Tennessee decisions and the pertinent decisions of this Court.

The Court then deduced six criteria to be followed in determining whether a decision should be given retrospective or prospective effect and applied those criteria to the its initial *Patty* decision.

Petitioners here attack the Court's application of two of those criteria, i.e., whether the declaration of unconstitutionality was foreseeable, and whether there had been reliance on the unconstitutional statute.

There is no question but that the initial *Patty* decision was one of first impression. The court began its opinion with the statement, "We are called upon to settle a constitutional issue of first impression and substantial significance." The court then undertook a survey of the history of usury laws in Tennessee, tracing the development of the constitutional provisions and the various statutes and judicial decisions deemed pertinent.

The court then held: that it was a misconception that the Tennessee Constitution fixed a ten percent (10%) limitation on interest; that the Legislature under the first clause of Article 11, Section 7 could fix any legal rate of interest it deemed proper; that it was not required to fix a conventional rate; that the ILTCA did provide for a conventional rate; that the constitutional limtation on the conventional rate related to a maximum effective rate of interest; and that insofar as the ILTCA authorized a rate higher than that maximum effective rate, it was unconstitutional.

The foregoing holdings were, as the court stated, "of first impression."

The ILTCA and other statutes regulating interest charges in Tennessee had been in effect for many years — hundreds of thousands of transactions had been entered into under those statutes. Thousands of claims by creditors against debtors under those statutes had been enforced in the courts.

Petitioners base their contentions in this regard upon *In re Bogan,* 281 F.Supp. 242 (W.D.Tenn. 1968), but that case does not support their position. That case involved a petition to review the actions of a referee in bankruptcy in denying a claim on the ground of usury. While the court did discuss Article 11, Section 7, it did not purport to decide the issues decided in *Patty;* rather, at p. 251, the court held "the claim note was usurious on its face in that it provided for interest in excess of the amount authorized by the Legislature of Tennessee . . ." *Bogan* was cited by the Tennessee Supreme Court in its review of judicial decisions in the *Patty* case, at p. 533. Suffice it to say that if *Bogan* had been the definitive decision claimed by Petitioners here, the Tennessee Supreme Court would have not deemed it necessary to embark on its detailed historical analysis, but would merely have cited *Bogan.*

Petitioners further assume that the question of reliance was one of fact; and that they were, therefore, entitled to introduce proof on that point; and that the denial of that opportunity in advance of the court's decision deprived them of due process.

The question of reliance, however, where a duly enacted statute is involved, is not one of fact, but one of law. As the majority in *Patty* observed, at p. 540:

1. An unconstitutional act "is not void, but voidable only" until condemned by judicial pronouncement, citing *Roberts* v. *Roane County,* 160 Tenn. 109, 23 S.W.2d 239 (1929).

2. Every act of the Legislature is presumptively constitutional until judicially declared otherwise, citing *Bricker* v. *Simms,* 195 Tenn. 361, 259 S.W.2d 661 (1953).

3. The presumption in favor of the validity of statutes requires that they be observed until declared void by an authoritative tribunal, citing *Rust* v. *Newby,* 171 Tenn. 127, 100 S.W.2d 989 (1937).

Plaintiffs continue in their petition here to attempt to convert a decision as to the law into a question of fact.

The nature of the proof which was sought to be introduced in the *Hannum* case further demonstrates the unsoundness of Petitioners' position. Witness the charges:

Charge 1. An allegation that one lawyer in Memphis had stated an opinion that the Industrial Loan & Thrift Companies Act was unconstitutional.

Clearly, other lawyers thought the statute was constitutional. In any event, the issue is not what some lawyer or even group of lawyers thought about what a court might decide, but whether, as a matter of law, the people have a right to rely on and follow the statutes as enacted by the Legislature.

Charge 2. An allegation that the Industrial Loan & Thrift Companies and their lawyers entered a giant conspiracy to prevent any appellate court from passing on the constitutionality of the Industrial Loan & Thrift Companies Act.

The absurdity of that allegation is manifest. First of all, it was an industrial loan and thrift company that appealed the *Patty* case. For that conspiracy to have worked, there would have also had to have been a giant conspiracy between all the debtors against whom the Act was enforced and all their lawyers to avoid any appeal.

Charge 3. An allegation that following the requirements of the bankruptcy referee in the Western District of Tennessee in Chapter XIII cases, whereby the full charges permitted under the Industrial Loan & Thrift Companies Act were not allowed, indicated some sort of admission that the Act was unconstitutional.

Those requirements, however, were imposed pursuant to the power of the Bankruptcy Court under Federal law, as is evident from the fact that such requirements continued to be imposed

after the adoption of the new constitutional provision concerning interest and the new Industrial Loan & Thrift Companies Act.

Petitioners' claims rest on the proposition that all persons who may be affected by a judicial decision have a due process right to be heard with respect to that decision prior to its enunciation. Clearly, that proposition is without merit. There is no procedural means and no constitutional, or other, necessity for the joinder of all persons who may be affected by the precedential effect of a judicial decision.

These Petitioners were afforded the opportunity to be heard with respect to their claimed rights. They voluntarily chose to withdraw those claims from the Court. Instead, they elected to allow one of their number, the Plaintiff Hannum, to proceed with a test case. She is not a party to this Petition, and they are in no position to claim that the court violated their rights in refusing to determine issues they had withdrawn from determination.

CONCLUSION

The decision of the Tennessee Court of Appeals that the Circuit Court of Blount County did not abuse it discretion in denying Petitioners' prayer for a declaration as to the construction of a statute which had been repealed did not even raise a Federal constitutional question, much less violate any rights of these Petitioners.

The Petition should be denied.

Respectfully submitted,

Valerius Sanford
Gullett, Sanford & Robinson
230 Fourth Avenue, North
P. O. Box 2757
Nashville, Tennessee 37219
(615) 244-4994

Counsel of Record
For all Respondents

J. W. Baker, Esq.
11th Floor, Valley Fidelity Bank Bldg.
P. O. Box 1708
Knoxville, TN 37901
(615) 637-5600

For Commercial Credit Plan, Inc.

Bernard E. Bernstein, Esq.
600 First Tennessee Bank Building
Knoxville, TN 37902
(615) 546-8030

For American Credit Company and
Home Credit Company of
Tennessee, Inc.

William B. Felknor, Esq.
303 Ellis Avenue
P. O. Box 144
Maryville, TN 37801
(615) 982-3691

For Cumberland Capital Corporation

APPENDIX A

IN THE CIRCUIT COURT FOR BLOUNT COUNTY, TENNESSEE

No. 1429

Fred J. Robinson, et al,
Plaintiffs,

vs.

Cumberland Capital Corporation, et al,
Defendants.

ORDER

This cause came on to be heard on the 13th day of December, 1976, upon the motion of Landmark Finance Corporation of Tennessee to reconsider the action of the Court in certifying this cause as a class action as to Landmark Finance Corporation of Tennessee and upon argument of counsel the Court is of the opinion that the motion to reconsider of Landmark Finance Corporation is well taken.

IT IS, THEREFORE, ACCORDINGLY ORDERED, ADJUDGED and DECREED that the action of the Court hereinbefore entered on November 16, 1976 in certifying this action as a class action insofar as James D. Northern vs. Landmark Finance Corporation of Tennessee is concerned is amended by deleting Landmark Finance Corporation of Tennessee as a named defendant. Landmark Finance Corporation of Tennessee is stricken as a named defendant and its name is dropped from further documents and the name of Allen Kidwell as attorney for Landmark Finance Corporation of Tennessee is stricken from further notices as representing the Defendant, Landmark Finance Corporation of Tennessee. However, Landmark Finance Corporation of Tennessee is retained as an unnamed member of the defendant class.

THIS Order made this the 13th day of December, 1976 and is entered now for then, this the 4th day of January, 1977.

Willard Kittrell
JUDGE

APPROVED FOR ENTRY:

/s/ Rom Meares

/s/ David T. Black
Attorneys for Plaintiffs

/s/ Allen Kidwell
Attorney for Defendants

APPENDIX B

IN THE CIRCUIT COURT OF BLOUNT COUNTY,
TENNESSEE
AT MARYVILLE

No. 1429

Fred J. Robinson, et al.,

v.

Cumberland Capital Corporation, et al.

STIPULATION FOR ENTRY OF JUDGMENT AS TO SMOKY MOUNTAIN HOUSING CORPORATION

The Plaintiff, Smoky Mountain Housing Corporation, and the Defendant, Cumberland Capital Corporation, having entered into an agreement to compromise and settle the controversies existing between them and to the dismissing of this case as to the claim of Smoky Mountain Housing Corporation against Cumberland Capital Corporation, with prejudice, Smoky Mountain Housing Corporation and Cumberland Capital Corporation, as indicated by their execution of this stipulation and the signatures of their counsel hereto agree that a consent decree and judgment may be entered in this cause dismissing the claim of Smoky Mountain Housing Corporation against Cumberland Capital Corporation, with prejudice.

Dated this 15th day of May, 1978.

/s/ Earl D. Caldwell

/s/ Anne T. Caldwell

Smoky Mountain Construction Company, Inc.

By: /s/ Earl D. Caldwell

/s/ David Black

Attorney for Smoky Mountain Housing Corporation, Earl D. Caldwell and Anne T. Caldwell

Cumberland Capital Corporation

By: /s/ F. A. McIntire, Jr.
President

/s/ Val Sanford

Attorney for Cumberland Capital Corporation

APPENDIX C

IN THE CIRCUIT COURT FOR BLOUNT COUNTY,
TENNESSEE
AT MARYVILLE

No. 1429

Fred J. Robinson, et al.,
Plaintiff,

vs.

Cumberland Capital Corporation, et al.,
Defendants.

ORDER

This cause came on to be heard on February 2, 1981, before the Honorable C. Allen High, Chancellor, holding the Circuit Court for Blount County, Tennessee, by designation. The cause was before the Court for trial upon the Complaint, the Amendments thereto, the Answers filed by the Defendants, and pursuant to the Memorandum and Pretrial Order entered by the Court on December 29, 1980, and the entire record.

Court having convened, counsel for the Plaintiffs gave oral notice that they wished to take a voluntary dismissal without prejudice pursuant to Rule 41 of the Tennessee Rules of Civil Procedure in behalf of the Plaintiffs, Fred J. Robinson, Janet Hatcher (formerly Janet Robinson); Tecora Dowdle, individually and as Administratrix of the estate of Camilla Fortune; James D. Northern; and Charles T. Dawson and wife, Alice E. Dawson, (hereinafter "Plaintiffs"), as to all claims asserted by them with the exception of that claim generally asserted in paragraph XII, section 2, of the Complaint wherein the Plaintiffs sought declaratory relief. Counsel for the Plain-

tiffs announced that the voluntary dismissal would extend as to all claims for relief with the exception of declaratory relief as prayed for in said paragraph XII, section 2, against the Defendants Cumberland Capital Corporation, American Credit Company, Home Credit Company of Tennessee, Inc., BFS Finance, Inc., and American Credit Company of Tennessee, Inc., (hereinafter the "Defendants").

Thus, there would remain for disposition the sole claim for declaratory relief asserted by all of the Plaintiffs against all of the Defendants and all claims asserted by Sharon Y. Hannum against Commercial Credit Plan, Inc. In accordance with Rule 41, the notice of dismissal as herein stated is appropriate and will be permitted by the Court with all costs to be taxed against the Plaintiffs.

Thereafter, counsel for the Defendants moved the Court to dismiss with prejudice the remaining claims of the Plaintiffs for declaratory relief in that the remaining portion of the Complaint as amended failed to state a claim upon which declaratory relief could be granted. Counsel for the Defendants urged that pursuant to TCA §23-1101, et seq., the Plaintiffs had no further rights to be declared as between the parties and that they were seeking an advisory opinion which the Court is not authorized to issue. Further, this Court in its Memorandum and Pretrial Order dated December 29, 1980, had considered the prayer of all Plaintiffs for declaratory judgment and had determined that this was not a proper case for declaratory relief. Accordingly, the motion of the Defendants to dismiss the remaining claims of the Plaintiffs is proper and will be granted.

It is, therefore, ORDERED, ADJUDGED and DECREED as follows:

1. Upon the oral notice during trial by counsel for the Plaintiffs, all claims asserted by the Plaintiffs with the exception of the claim for declaratory relief asserted generally in paragraph XII, section 2, of the Complaint against the Defendants are dismissed without prejudice, a voluntary dismissal having been taken by the Plaintiffs.

2. The remaining claim for declaratory relief asserted generally in paragraph XII, section 2, of the Complaint in behalf of the Plaintiffs as against the Defendants be and the same is hereby dismissed with prejudice.

3. In accordance with paragraphs 1 and 2 above, all pending claims as between the Plaintiffs and the Defendants are therefore dismissed in their entirety and all costs incident thereto are taxed against the Plaintiffs for which execution may issue if necessary.

4. The case of Sharon Y. Hannum against Commercial Credit Plan, Inc., except with respect to declaratory judgment relief which has heretofore been denied, shall continue at trial.

ENTER:

/s/ C. Allen High, Chancellor
Sitting By Designation

Attorneys for Plaintiffs:

David T. Black

Rom Meares

Attorneys for Defendants:

Cumberland Capital Corporation

By: /s/ William B. Felknor

Commercial Credit Plan, Inc.

By: /s/ J. W. Baker

American Credit Company, Home Credit Company Of Tennessee, Inc., and American Credit Company Of Tennessee, Inc.

By: /s/ Bernard E. Bernstein

BFS Finance, Inc.

By: /s/ John A. Walker, Jr.

Of Counsel

/s/ Val Sanford

APPENDIX D

IN THE CIRCUIT COURT FOR BLOUNT COUNTY, TENNESSEE

No. 1429

Fred J. Robinson

vs.

Cumberland Capital Corp., et al

JUDGMENT

This cause insofar as it concerns the action of plaintiff Sharon Y. Hannum against defendant Commercial Credit Plan, Incorporated came on for trial before the Honorable C. Allen High, Chancellor, sitting by designation, on the second day of February, 1981, and at the conclusion of the proof, whereupon each of the parties rested, the Court took the action under advisement and ordered that each of the parties file a post-trial brief. Those briefs were subsequently filed, and the Court, after giving full consideration to all matters in issue, has filed a Memorandum, which is incorporated herein by reference, in which it is found that the action should be dismissed.

It is accordingly Ordered and Adjudged that plaintiff Sharon Y. Hannum take nothing from defendant Commercial Credit Plan, Incorporated and that the action of said plaintiff against said defendant shall be and it hereby is dismissed at the cost of said plaintiff and her sureties.

ENTER:

Judge, By Designation

APPROVED FOR ENTRY:

Attorney for plaintiff Sharon Y. Hannum

/s/ J. W. Baker

Attorney for defendant Commercial Credit Plan, Incorporated

MEMORANDUM

The plaintiff filed a motion for further oral argument. The matter has been tried and fully briefed and further argument would not be beneficial.

This is an action by plaintiff, Sharon Hannum, to recover from defendant, Commercial Credit Plan, Inc., usury charges.

As set out in the pre-trial order, the first issue is:

> "Did defendant violate the Industrial Loan & Thirft Act as then written?

On February 12, 1975, defendant made a loan to plaintiff advancing a total of $840.00. Plaintiff elected to receive accident and health insurance and was charged $33.46, and life insurance and was charged $30.58. The interest charge was $166.13 and the service charge was $37.67. Plaintiff signed a non-interest bearing note in the amount of $1,107.84. Details of the transaction are set out in Exhibit 2. (Copy attached).

Defendant was regulated by and operating under the provisions of the Industrial Loan & Thrift. (Formerly T.C.A. §45-2001, et seq.) The Act permits the interest and service charges to be discounted. Discount is interest paid in advance at the time the loan is granted. Technically, a discount loan is not a loan with interest.

The statute permits, and the parties made use of, an indebtedness certificate. The installment payments are made on the certificate, not on the note, and the note is paid in full at the end of the particular term.

The Act provides for an interest rate not to exceed 7-1/2% per annum in advance on the face amount of the loan for the full term. (T.C.A. §45-207(f)).

Plaintiff argues that the interest should be computed on a fomula I = Prt (Interest = Principal x rate x time) using $840.00 as the principal amount of the loan. Discount, however, is computed on the maturity value, not on the loan proceeds.

The terms that enter into discount computations are:

D - discount

A - face of note

t - time

d - rate

These factors form the equation:

$D = Adt$*

If you are given any three of these factors the fourth can be computed. The face amount of the Hannum loan, $1,107.84 is due in two years. The discount was $166.13. What is the rate charged? The formula becomes:

$$d = \frac{D}{At}$$

$$d = \frac{166.13}{1{,}107.84 \times 2} = 7.49\%$$

---

* This is a recognized formula, M. Neifeld, *Guide to Installment Computations* (1953).

Using the same formula to compute the discount:

$D = Adt$

$D = 1107.84 \times 7.5\% \times 2 = 166.17$

The Act permits a service charge of 4% to be discounted in advance from the principal amount of the loan.

T.C.A. §45.2007(i)).

The same formula can be used to compute the service charge rate. Defendant deducted from $1,107.84 the $166.13 discount to arrive at the principal amount of the loan as $941.71. The service charge was $37.67. What is the service charge rate?

$$D = \frac{37.67}{941.71} = 4\%$$

In computing these charges defendant used charts approved by the State Insurance Department.

The insurance rate for credit life was $1.38 per 100 per year. This was a two year loan so the rate would be $2.76 per 100 or 2.76%. The accident and health rate was $3.02 per 100 or 3.02%.

When defendant computed the interest and other charges the only unknown factor was the face amount of the note. The formula used by defendant to determine this amount was:

a = cash advance

x = amount of note

t = term of loan

y = rate of life insurance

w = rate of accident and health insurance

$$a = 100\%x - [(7.5\% \bullet t \bullet x) + 4\%(x - (7.5\% \bullet t \bullet x)) + yx + wx]$$

Applying the formula to the Hannum loan:

$$\$840.00 = 100\%x - [(7.5\% \bullet 2 \bullet x) + 4\%(x - (7.5\% \bullet 2 \bullet x)) \times 2.76\%x + 3.02\%x]$$

$$\$840.00 = 100\%x - [15\% + 3.4\%x + 2.76\%x + 3.02\%x]$$

$$\$840.00 = 100\%x - 24.18x$$

$$\$840.00 = 75.82\%x$$

$$x = \frac{\$840.00}{.7582}$$

$$x = \$1,107.88$$

The second Hannum loan was computed on the same formula except the service charge was only on new money, as required by statute.

The Court is of the opinion that defendant's method of computing the charges complied with the Industrial Loan & Thrift Act. The Court, therefore, finds defendant did not violate the Act as then written.

Defendant's attorney should prepare a judgment dismissing this action.

/s/ C. Allen High, Judge
By Designation

April 1, 1981

cc. Rom Meares
Bernard Bernstein
John A. Walker, Jr.
J. W. Baker
William B. Felknor
Val Sanford

APPENDIX E

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

Blount Law

Sharon Y. Hannum,
Appellant,

vs.

Commercial Credit Plan, Inc.,
Appellee.

ORDER

On considering the application for permission to appeal and briefs filed in this case and the entire record, the application of Sharon Y. Hannum is denied at cost of the appellant.

PER CURIAM

APPENDIX F

TENNESSEE RULES OF APPELLATE PROCEDURE

Rule 11.

APPEAL BY PERMISSION FROM APPELLATE COURT TO SUPREME COURT

(a) Application for Permission to Appeal; Grounds. An appeal by permission may be taken from a final decision of the Court of Appeals or Court of Criminal Appeals to the Supreme Court only on application and in the discretion of the Supreme Court. In determining whether to grant permission to appeal, the following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons that will be considered: (1) the need to secure uniformity of decision, (2) the need to secure settlement of important questions of law, (3) the need to secure settlement of questions of public interest, and (4) the need for the exercise of the Supreme Court's supervisory authority.